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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8 United States of America, ) No. CV-08-1829-PHX-FJM  
9 Plaintiff, ) **ORDER**  
10 vs. )  
11 )  
12 75.746 Acres of Land et al., )  
13 Defendants. )  
14

15 We tried this eminent domain action under Rule 71.1, Fed. R. Civ. P., on May 11 and  
16 12, 2010. These are our findings and conclusions under Rule 52(a), Fed. R. Civ. P.

17 The United States acquired an aviation easement over 75.746 acres of land, part of a  
18 larger parcel of 211.58 acres, owned by Ashby Land LLC, located at the end of the southwest  
19 runway at Luke Air Force Base in Glendale. The only issue in dispute is the amount of just  
20 compensation due, measured by the fair market value of the land on the day of taking, here,  
21 October 6, 2008.

22 Unfortunately, the parties' disagreement over the evaluation method to be used causes  
23 them to be deeply divided over value. The United States contends that the comparable sales  
24 method should be used. Ashby contends that there are no comparable sales, and thus the  
25 income approach to value should be used. That approach does not encompass lost future  
26 profits (which are not allowed), but instead focuses on value from the perspective of a  
27 potential buyer in the relevant market. See our Order of April 7, 2010 (doc. 58). The parties  
28 agreed that the burden of proof rested with the landowner.

1 Stanley Ashby testified that the 2008 easement would prevent him from leasing his  
2 land to rose bush farmers because the easement vests total discretion in the Commander of  
3 Luke AFB to exercise rights under the easement. The easement goes beyond allowing  
4 flights. It prohibits birds (which farming attracts), allows for the construction of lighting  
5 fixtures, navigational aids, signs, and most importantly, allows the Base Commander to go  
6 in and tear out crops at any time. Since rose bush farming is on a two-year cycle, no one  
7 would invest in farming the land in the face of these risks. He testified that his property was  
8 appraised for Federal Estate Tax purposes at \$40,000.00 per acre in 2007.

9 Ashby's expert, Stephen Brophy, testified that Arizona now exceeds Texas and  
10 California in the rose bush farming industry. Because of its unique soil and location, the  
11 highest and best use for the subject property is rose bush farming. He estimates it takes an  
12 investment of about \$13,000.00 per acre to farm rose bushes. He also asserts, without  
13 contradiction (the United States' expert did not even read Brophy's report and did not testify  
14 in rebuttal to it), that there are no comparable sales in the area. He asserted that the  
15 "comparables" cited by the United States' expert were not comparable at all. None involved  
16 rose bush farming. Most were sales to speculators and developers in a down market. In light  
17 of the extensive authority to remove crops vested in the Base Commander by the easement,  
18 he concluded that much of the property lost value at the rate of \$34,500.00 per acre. He  
19 ultimately concluded that the total diminution in value was \$3.1 million.

20 Steven Nagy testified as the United States' expert. He appraised the value of the  
21 easement taken at \$418,000.00. He concluded that various local governmental restrictions  
22 already limit the use of the subject property. He disputed the use of the income approach to  
23 value for agricultural uses. Instead, he looked at land around Luke AFB for comparables,  
24 but found no sales. So, he went all over the west valley looking for sales. He acknowledged  
25 that the land before all the restrictions were imposed was valued at \$40,000.00 per acre, but  
26 concluded that the pre-2008 easement restrictions already reduced the value to \$6,000.00 per  
27 acre. He thought that the 2008 easement was slightly more restrictive than those already  
28 imposed (the allowance of clear cutting and the potential loss of crop) and valued this loss

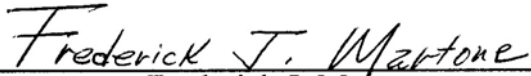
1 at \$4,000.00 per acre. As noted, he had not seen the Brophy report and was not prepared to  
2 rebut it.

3 I find and conclude that there were no comparables to the subject property, and that  
4 Nagy's use of sales outside the Luke area for properties that were not used for rose bush  
5 farming failed to give a true measure of value. Thus, Brophy was right to not use the  
6 comparable sales method, because there were no legitimate comparables. I find that the  
7 income approach for this land, which is uniquely suited to rose bush farming, is a reasonable  
8 approach where there simply are no comparables. I find it remarkable that the United States'  
9 expert failed to even read the Brophy report and failed to rebut it. Thus, while it might have  
10 been possible to produce different numbers (e.g., the capitalization rate) using the income  
11 approach, there is no evidence before me to construct a damages model different from that  
12 employed by Brophy.

13 Brophy was a highly credible witness. His opinions were tempered by realism and  
14 did not overreach. I therefore find it more probable than not that the sum of \$3.1 million  
15 represents the difference between the value of the whole 211-acre parcel (including the  
16 75.746 subject to the easement) before the taking and after the taking, and is fair, adequate  
17 and just compensation. This figure is driven largely by the authority the easement gives to  
18 the Base Commander to "cut to ground level", Ex. 2 at 8, crops grown on the land. Although  
19 the United States suggested that was unlikely, it would not commit to not doing it when given  
20 the opportunity at trial. The United States believed that would be an alteration of the  
21 easement, thereby admitting not only the authority to clear the property of crops but also the  
22 possibility that it might happen. It simply would not represent that it would not clear the  
23 ground of crops.

24 At all events, the clerk is directed to enter final judgment in favor of the defendants  
25 and against the United States in the amount of \$3.1 million.

26 DATED this 8<sup>th</sup> day of June, 2010.

27   
28 Frederick J. Martone  
United States District Judge